In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 722 and 723

JOHN W. FRANK ET AL., PETITIONERS

v.

WILSON & CO., INC.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The petition for writs of certiorari in this case presents questions of substantial importance in the administration and enforcement of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. I, 201. This memorandum, therefore, is submitted on behalf of the Administrator, as *amicus curiae,* to urge that the petition for certiorari be granted.

The court of appeals reversed the district court's judgment for petitioners on the ground that the *de minimis* doctrine precludes recovery

for a few minutes of work required of employees prior to their scheduled shift, although the period of time was fixed and regular, was required by strictly enforced company rule, and was made compensable by express agreement. This ruling, we believe, is not only a misapplication of the *Mt. Clemens* decision (328 U. S. 680), but is directly in conflict with the pertinent statutory provisions of the Portal Act, enacted subsequent to the *Mt. Clemens* decision, and establishes a dangerous precedent on an issue of considerable importance in the administration of the Fair Labor Standards Act. While superficially it may appear to be of little significance to the public interest in the administration of the Act whether a few minutes a day are to be included in computing the hours worked, the confusion and uncertainty that will result from annulling the settlement of such issues by contract or collective bargaining agreement are by no means trifling, as past experience has conclusively demonstrated.

This is not a case concerning short, irregular, and unascertainable periods of time, varying in amount for each employee, nor does it present a question of "split-second absurdities." Cf. *Mt. Clemens* case, 328 U. S. at 692. On the contrary, the question here is whether the *de minimis* doctrine shall relieve an employer from liability for a period of time which is fixed precisely, which is definite and regular every workday, which employees are required to work by a

strictly enforced company rule, and for which the employer has obligated himself to pay by collective bargaining agreement. The time involved amounts regularly to 25 minutes a week for each of 149 employees who work the full scheduled workweek. And, as the Court of Appeals states in its opinion, petitioners during the periods in question engaged in "their usual daily activities" (172 F. 2d 712, 714) and in "the same type of activity that they carried on from time to time throughout the day" (172 F. 2d at 715). The effect of applying the *de minimis* rule to such fixed, definite and regularly worked periods of time is to permit an employer systematically and arbitrarily to disregard periods of work at the beginning and end of a scheduled shift, and to prevent effective settlement of grievances over such periods even by express provision in a collective bargaining agreement.

We do not believe that the *Mt. Clemens* decision intended to sanction any such application of the *de minimis* doctrine. The reference in the *Mt. Clemens* decision to the possible applicability of the *de minimis* rule was predicated upon a factual situation quite different and clearly distinguishable. It involved uncertain and indefinite periods of time, varying for each individual employee, spent in walking from the time clock to their work benches, and in various preliminary activities prior to the commencement of productive activities. A most important and much em-

phasized factor in that case was the difficulty of ascertaining "the precise extent of uncompensated work" (328 U. S. at 687). Moreover, the employer had made no agreement to pay for such periods.

The enactment of the Portal-to-Portal Act of 1947 clearly indicates that the *de minimis* rule was not to be applicable to a case like this, in which the court below conceded that the activities in question "were covered by an express provision of a written contract." Section 2 of the Portal Act, which is applicable to the period prior to the passage of that Act (May 14, 1947), explicitly provided that *"in determining the time* for which an employer employed an employee [in applying the minimum wage and overtime provisions of the Fair Labor Standards Act] there shall be counted *all that time, but only that time"* which was compensable by express contract provision or by the custom or practice at the place of employment.[1] Section 4, which applies *in futuro,* prescribes the same test with respect to walking time and to "preliminary" and "postliminary" activities. The intent to include *"all"* such compensable time as "time worked" under the Fair Labor Standards Act could not have been stated more clearly. Cf. *Mabee* v. *White Plains Pub. Co.,* 327 U. S. 178 at 181–182.

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[1] See Administrator's Interpretative Bulletin as to effect of the Portal Act on the Fair Labor Standards Act, Title 29, Code of Federal Regulations, 1947 Supp. 790.24. The full text of Section 2 of the Portal Act is reprinted in the Appendix, *infra,* pp. 7–8.

The result reached by the decision below is directly contrary not only to the express language of the Portal Act, but to the clear Congressional intent. During the course of the debates on the measure, it was suggested in the Senate that most of the problems might be solved by a *de minimis* rule applicable to all time less than a fixed amount. In explaining why such a proposal had not been adopted, Senator Cooper, one of the sponsors of the new legislation, pointed out that because of the uncertainties inherent in the application of a *de minimis* rule the result would be that "instead of reducing or eliminating this litigation, it would have been increased, as we believe, tenfold". 93 Cong. Rec. 2300. See also the Conference Report, which explains that one of the purposes of Section 2 (c) was "to emphasize that employers are not relieved from liability for the payment of minimum wages and overtime compensation * * * for any time during which the employee engaged in activities compensable under the rules above stated [i. e., by contract or custom]" (House Report No. 326, 80th Cong., 1st Sess. (1947) p. 10).

It is thus apparent that Congress, recognizing that differences over the question of compensation for such periods of time were not trifling, but were of considerable importance to both employer and employees, deliberately and advisedly removed these problems from the possible application of the *de minimis* rule and made the

agreement of the parties determinative. The Seventh Circuit's decision reopens the many knotty problems which have plagued the Administrator and the courts for a number of years, and which were largely responsible for the flood of litigation which precipitated the enactment of the Portal Act.

The general importance of the issue and the need for prompt review by this Court is further indicated by the fact that the Seventh Circuit's ruling has already been cited and followed as a precedent by the Sixth Circuit in *Smith* v. *Cleveland Pneumatic Tool Co.*, decided April 22, 1949.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be granted.

PHILIP B. PERLMAN,
Solicitor General.

WILLIAM S. TYSON,
Solicitor of Labor.

MAY 1949.

APPENDIX

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. I, 252:

SEC. 2.

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provi-

sions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

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